No. 84-722

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID ALAN LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends that the courts below, after determining that he was not given access to government documents that he requested and that might have been useful in impeaching a prosecution witness, should have set aside his conviction without inquiring into whether he was prejudiced.

1. After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to 18 months' imprisonment. During the trial, he requested, under the Jencks Act, 18 U.S.C. 3500, the prior statements of a government witness. In response to this request, the government, in addition to releasing some

material to petitioner, delivered 1500 pages of documents to the district judge. The government took the position that the defendant was not entitled to receive these documents but provided them to the judge so that she could inspect them in camera. See 18 U.S.C. 3500(c). The district judge, however, asserting that the documents pertained to a different investigation, declined to review them herself and did not release them to petitioner. Pet. App. 27-31.

The court of appeals initially vacated petitioner's conviction (Pet. App. 27-41; 715 F.2d 1364) on the ground that the district court erred in not personally reviewing the 1500 pages of documents (Pet. App. 28-35). The court of appeals remanded to the district court to permit such a review, stating that a "new trial will be required only if the court, after conducting such *in camera* inspection, concludes that a producible document or documents exist, and that the substantial rights of [petitioner] were affect[ed] by failure to make such documents available for [petitioner's] use in * * * cross-examination" (*id.* at 41).

On remand, the district judge examined the documents and "determined that while the government erred in failing to turn over two prior statements of [the] government witness * * *, the error was not of constitutional magnitude and was harmless beyond a reasonable doubt" (Pet. App. 43). The district court accordingly reentered the judgment of conviction against petitioner (*ibid.*). The court of appeals affirmed in an unpublished opinion (*id.* at 42-45). The court of appeals agreed with the district court's finding that the error was harmless beyond a reasonable doubt, noting that the witness was impeached on other grounds and that the witness's testimony was not crucial to the government's case in any event (*id.* at 44).

2. Petitioner's contention that the courts below erred in applying a harmless error principle relies principally on *Bagley* v. *Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), cert. granted *sub nom. United States* v. *Bagley*, No. 84-48 (Nov. 13, 1984). Petitioner asserts that *Bagley* establishes that a conviction must automatically be set aside if the government has failed to disclose requested information that might be helpful in impeaching a prosecution witness.

We do not disagree with petitioner's characterization of the holding of *Bagley*, but as we explain in our brief on the merits in *Bagley*,[1] that decision is clearly wrong.[2] This Court's decisions unequivocally establish that the government's failure to disclose evidence to the defendant warrants overturning a conviction only if the evidence is material — that is, if it is sufficiently likely, as judged by the appropriate standard, to have had some effect on the outcome of the trial. Indeed, for the reasons we state in our brief in *Bagley* (at 18-41), even the "beyond a reasonable doubt" standard applied by the courts below is unduly favorable to petitioner.

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[1]A copy of this brief has been served on counsel for petitioner.

[2]The court of appeals in this case appears to have distinguished *Bagley* on the ground that *Bagley* mandated the setting aside of a conviction only if the defendant has been precluded from undertaking "effective cross-examination" (Pet. App. 44). As we explain in our brief in *Bagley* (at 16), a requirement of materiality is inherent in the notion of "effective" cross-examination. Unlike the court below, we believe that the court of appeals in *Bagley* did not consider the materiality vel non of the undisclosed evidence to be relevant.

We note that because the court of appeals' opinion is unpublished, its interpretation of *Bagley* has no precedential force. See Pet. App. 42 n.*.

While we therefore submit that petitioner is clearly not entitled to relief, we do not oppose holding the petition for disposition as appropriate in light of the Court's decision in *United States* v. *Bagley*, No. 84-48.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1985